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Supreme Court, U.S.
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No. 91-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

COMMONWEALTH OF PENNSYLVANIA

Petitioner,

V.

KARL S. CHAMBERS

Respondent.

Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

PETITION FOR A WRIT OF CERTIORARI

JORDAN W. LORENCE
JANE E. HADRO
3479 S. Stafford St.
Arlington, Virginia 22206
(703) 882-4799

H. STANLEY REBERT*
District Attorney
Court House
28 E. Market St.
York, Pennsylvania 17401
(717) 771-9600
*Counsel of Record

Attorneys for Petitioner

QUESTIONS PRESENTED

The Pennsylvania Supreme Court reversed the imposition of the death penalty by a jury because the prosecutor ended his closing argument during the sentencing phase with the words, "as the Bible says, 'and the murderer shall be put to death.' " The Pennsylvania Supreme Court ruled that it was reversible error per se for prosecutors to rely upon the Bible or any other religious writing in support of the imposition of the death penalty. The Pennsylvania Supreme Court said that prosecutors who violate that per se rule may be subject to disciplinary action.

1. Is it per se reversible error under the United States Constitution for prosecutors to quote the Bible or other religious writings when urging jurors during closing argument of the sentencing phase to impose the death penalty on a defendant convicted of first degree murder?

2. Did the Pennsylvania Supreme Court violate the Free Speech Clause of the First Amendment by imposing a content-based restriction on prosecutors which prohibits them from using any reference to the Bible or other religious writings when urging jurors to impose the death penalty, and subjects the prosecutors to professional discipline for violating the per se rule?

3. Did the Pennsylvania Supreme Court violate the Establishment Clause of the First Amendment by prohibiting prosecutors from referring to the Bible or other religious writings when urging jurors to impose the death penalty, and by threatening prosecutors with professional discipline for making religious references?

PARTIES

All parties are listed in the caption.

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DECISIONS BELOW

The jury verdict of the trial court is unreported. The decision of the Pennsylvania Supreme Court is reported at 599 A.2d 630 (Pa. 1991) and in the Appendix at 1a. The order of the Pennsylvania Supreme Court denying the motion for rehearing is unreported, but appears in the Appendix at 27a.

JURISDICTION

The Pennsylvania Supreme Court entered its opinion in this case on November 4, 1991. The Commonwealth of Pennsylvania moved that court for a rehearing, which was denied on January 7, 1992. This Court has jurisdiction under 28 U.S.C. 1257 to review the judgment of the Pennsylvania Supreme Court.

CONSTITUTIONAL PROVISIONS

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides in pertinent part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Statement of Facts[1]

On February 1, 1986, Anna Mae Morris entered the C & M Variety Store in York, Pennsylvania, to buy some groceries

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1 The facts are taken from the opinion of the Pennsylvania Supreme Court. (599 A.2 623, 635; App. at 1a).

with the proceeds from her Social Security check. The defendant and some of his friends were eating fish sandwiches in the store and playing pinball. The evidence produced at trial showed that Karl Chambers followed Anna Mae Morris, and demanded money from her. After she refused, Chambers robbed her and then beat her to death with an axe handle.

The police investigation of the matter uncovered sufficient evidence to arrest and charge Karl Chambers with robbery and first degree murder.

B. Course of Proceedings

Trial - the guilt phase

Pennsylvania law requires a bifurcated trial on guilt and sentencing for a charge of first degree murder. After the presentation of the evidence, the jury found Chambers guilty of first degree murder and robbery.

Trial - the penalty phase

Immediately following the jury's return of the guilty verdicts, the trial judge commenced a sentencing hearing. The prosecutor, at the end of his closing argument said,

> Karl Chambers has taken a life. As the Bible says, And the murderer shall be put to death. Thank you.[2]

The defense attorney immediately objected, saying, "it is clearly not relevant to quote the Bible or what any other document says."[3] The trial court responded by saying, "the Court will charge the jury and will note your objection."[4]

The trial judge charged the jury, with no specific

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2 The transcript of the prosecutor's closing argument is reprinted in the appendix of this petition. This quote in the Appendix at 22a, and in the Pennsylvania Supreme Court's opinion, 599 A.2d at 643; App. at 25a.

3 Tr. at 1201-2; App. at 30a.

4 Tr. at 1202 at 30a.

instruction on the Bible quote. The jury found one aggravating factor (that the killing had occurred during the commission of a robbery) and one mitigating factor (the defendant had no significant history of prior criminal offenses). The jury found that the aggravating factor outweighed the mitigating factor and sentenced Chambers to death. The defendant appealed to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court's Decision

Karl Chambers appealed to the Pennsylvania Supreme Court, raising sixteen grounds for overturning the conviction and the death penalty. The Pennsylvania Supreme Court rejected all issues of error raised by the defendant, except one—the prosecutor's quoting of the Bible during his closing argument during the penalty phase of the trial.

The Pennsylvania Supreme Court ruled that the prosecutor "overstepped the bounds of oratorical flair in his closing argument by referring to the Bible."[5] That court then created a per se rule prohibiting prosecutors from referring to the Bible during death penalty cases, saying:

> We now admonish all prosecutors that reliance upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.[6]

That court cited no provision of the state or federal constitutions that requires the ban but said that the prosecutor had "interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom."[7] The

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5 599 A.2d at 643; App. at 22a.

6 599 A. 2d at 644; App. at 24a.

7 App. at 25a.

court found that the Bible reference prejudiced the jury:

> We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance.

599 A. 2d at 643; App. at 25a.

The Pennsylvania Supreme Court said the prosecutor erred by citing an authority outside of the specific factors listed in the state death penalty statute. That court said the jurors should make their decision to impose the death penalty totally within the bounds of the Pennsylvania death penalty statute:

> Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law.

599 A. 2d at 643; App. at 25a.

The Pennsylvania Supreme Court then vacated the sentence of death and remanded the case to the trial court for a new sentencing hearing.[8]

Justice McDermott's Dissent.

Justice McDermott dissented, criticizing the "overreaction of the majority to the prosecution's biblical reference."[9] He pointed out that the proper standard for evaluating the prejudicial effect of a prosecutor's arguments is whether they have the effect of "arousing the jury's emotion to such a degree that it becomes impossible for the jury to impose

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8 599 A.2d at 644; App. at 26a.

9 *Id.*

sentence based on consideration of the relevant evidence according to the standards of the statute."[10]

Justice McDermott emphasized that the prosecutor's remark was an isolated comment referring "to one of the texts from which our social system has evolved."[11] He decried the majority's opinion as "an unmerited censure of citizens called to such vast responsibility."[12]

REASONS FOR GRANTING THE WRIT

Although this Court has ruled that improper prosecutorial comments can violate the fair trial rights of defendants charged with capital murder, this Court has rejected all invitations to fashion per se reversible error rules to ban a specific type of prosecutorial argument. Instead, this Court has ruled that challenged remarks by prosecutors should be examined on a case-by-case basis for constitutional error.

In contrast, the Pennsylvania Supreme Court in this case imposed a per se reversible error rule on prosecutors where the United States Constitution does not require it. This Court should accept this case for review in order to reject this unnecessary constitutional "requirement" found by the Pennsylvania Supreme Court.[13]

This case should by no means be interpreted as sanctioning all religious references in a courtroom situation. It is recognized that in many cases, the speech in question may inflame a jury and deny a fair trial to the defendant.

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10 *Id.*, quoting *Commonwealth v. Travaglia*, 502 Pa. 474 A.2d 288, 302 (1983).

11 *Id.*

12 *Id.*

13 The Pennsylvania Supreme Court did not explain what law or constitutional provision, state or federal, requires a rule of automatic reversal when prosecutors urge jurors to impose the death penalty by referring to the Bible. A careful reading of the Pennsylvania Supreme Court's decision indicates that the court thought the Biblical references

However, this Court should return to the case-by-case analysis upheld in all other Supreme Court decisions. Additionally, no evidence exists in this case to show that the prosecutor's comment did inflame the jury and did deny the defendant a fair trial.

Also, this Court should grant cert to rule that it is constitutionally appropriate for prosecutors to appeal to moral principles (like those found in the Bible) when urging jurors to impose the death penalty. This Court has acknowledged that jurors who are deciding whether to impose the death penalty have broad discretion, and inevitably bring their own personal ideological and moral principles and backgrounds to the decision. The imposition of the death penalty ultimately represents a moral judgment of the community on the deeds of the defendant.

In this case the prosecutor was in essence saying to the jurors that the moral standards of the community demand the imposition of the death penalty. The Bible has a historical role as a foundational document for the American legal system. The prosecutor *was not* urging the jury to disregard or defy Pennsylvania law but was appealing to the jurors to impose the death penalty, which the state allows them to do. What the prosecutor did in this case simply was not prejudicial error, either reversible or harmless, and was totally proper under the Constitution.

The Pennsylvania Supreme Court's per se rule violates the free speech rights of prosecutors guaranteed by the state and federal constitutions. The Pennsylvania Supreme Court's flat ban violates the Free Speech Clause, because the ban is content-based and is not justified by any compelling state

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violate due process rights of the defendant to receive a fair trial found in the fourteenth Amendment. Alternatively, the Pennsylvania Supreme Court may have found that the remarks violated the defendant's Eighth Amendment rights against cruel and unusual punishment and prejudiced the jury, which means the defendant would not get a fair trial.

interest, and because all religious references by prosecutors do not always violate a defendant's right to a fair trial. The rule acts as a prior restraint because of its reversible error rule and the threat of professional discipline for attorneys who quote the Bible in court.

Also, the Pennsylvania Supreme Court violated the Establishment Clause by prohibiting all religious references, even those that could not possibly prejudice the defendant's rights to a fair trial. The Pennsylvania Supreme Court's harsh rule against religious references violates both the tripartite test of *Lemon v. Kurtzman* and the proposed coercion test under *Lee v. Weisman*. That court erroneously ruled that religious remarks are inherently prejudicial and always violate the defendant's fair trial rights. Also, the prosecutor's reference to the Bible is protected under *Marsh v. Chambers* because ample historical evidence from early American history demonstrates that quoting the Bible in court to jurors did not violate the Constitution.

I.

NO FEDERAL CONSTITUTIONAL PROVISION REQUIRES A TOTAL BAN ON BIBLICAL REFERENCES BY PROSECUTORS URGING JURIES TO IMPOSE THE DEATH PENALTY

This Court has repeatedly ruled that prosecutorial arguments challenged as unconstitutional should be evaluated on a case-by-case basis to see if they have "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). This Court has emphasized the case-by-case basis of the analysis and has repeatedly rejected invitations to create constitutionally based per se reversible error rules for excluding specified types of prosecutorial arguments.

The Pennsylvania Supreme Court diverged from this settled precedent and now clutters death penalty jurisprudence with an additional, unnecessary obstacle for prosecutors. Now, prosecutors must fear that any references to the Bible during closing arguments will trigger automatic reversal and threaten them with professional discipline. That court improperly assumes that any reference to the Bible by a prosecutor inherently taints a jury in all contexts and always prejudices the case against the defendant.

This cannot be true. The Bible is an important book to our nation and a foundation for the American legal system. Its mere mention cannot be intrinsically prejudicial and per se reversible error.

When defendants complain of prosecutors referring to the Bible, courts should examine the usage the way this Court has repeatedly said to do it on a case-by-case basis. The Pennsylvania Supreme Court's draconian rule has no basis in this Court's rulings about the fair trial rights for those tried for capital murder, nor in the history of this nation.

A. <u>This Court Has Not Found a Constitutional Requirement for Per Se Reversible Error Rules Based on Prosecutor's Arguments in Any Context.</u>

This Court has rejected per se rules which automatically exclude certain types of prosecutorial comments. In *U.S. v. Young*, 470 U.S. 1 (1984), this Court said:

> Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial.

470 U.S. at 11.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court refused to establish a per se reversible error rule for the egregious situation when a prosecutor says to the jurors that

the defendant's failure to testify (i.e., exercise his Fifth Amendment privilege against self-incrimination) indicates the defendant's guilt. This Court reiterated that rule in *United States v. Hastings*, 461 U.S. 499 (1983), and related the sentiments of the late Chief Justice Roger Traynor of the California Supreme Court:

> . . . That when courts fashion rules whose violations mandate automatic reversals, they "retrea[t] from their responsibility, becoming instead 'impregnable citadels of technicality.' "

461 U.S. at 509.

If the Constitution does not mandate automatic reversal when a prosecutor directs the attention of a jury to the defendant's failure to testify in his own behalf, then certainly the prosecutor's reference to the Bible falls far short of violating the defendant's due process rights.[14] If the Fifth Amendment situation is not a candidate for a per se reversible error rule, then religious references by prosecutors certainly are not grounds for per se reversible error.

The Pennsylvania Supreme Court failed to follow the settled precedent of this Court rejecting per se reversible error rules. Instead, that court should have examined the prosecutor's remarks in the context of the entire trial.

B. This Court Has Allowed Juries to Use Moral Principles in Deciding Whether to Impose the Death Penalty.

The Pennsylvania Supreme Court created an overly-narrow rule in this case by limiting prosecutors' arguments in favor of the death penalty to only those which can be

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14 See also *Donnelly v. De Christoforo*, 416 U. S. 637 (1974) (prosecutor's remarks about potential plea bargaining examined in the context of the entire trial and found not to be prejudicial).

derived from the four corners of the state death penalty statute and the evidence presented at trial. This Court has repeatedly recognized the need for jurors to consider numerous factors, including moral principles.

This Court has repeatedly said that jurors bring their own moral principles and ideological beliefs to the jury room when deciding whether to impose death.[15] This is only understandable, because the imposition of death is such an important, sobering duty for juries.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), this Court expressed that in death penalty cases, "one of the most important functions any jury can perform in making such a selection [between death and life imprisonment] is to maintain a link between contemporary community values and the penal system." 391 U.S. at 520, n. 15. This Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), further characterized the ruling in *Witherspoon* this way:

> The Court expressly recognized that the purpose of the "broad discretion" given to a sentencing jury is "to decide whether or not death is 'the proper penalty' in a given case, noting that "a juror's general views about capital punishment play an inevitable role in any such decision," [citations omitted]. Thus a sentencing jury must be composed of persons capable of expressing the "conscience of the community on the ultimate question of life or death."

481 U.S. at 310, n.32. Again, in *McCleskey*, this Court said:

> Individual jurors bring to their deliberations "qualities of human nature and varieties of human

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15 For example, this Court has said, "Thus, the sentence imposed at the death penalty stage [of a capital case] should reflect a reasoned moral response to the defendant's background, character and crime." *Penry v. Lynaugh*, 492 U. S. 302, 319 (1989).

> experience, the range of which is unknown and perhaps unknowable." *Peters v. Kiff*, 407 U.S. 493 (1972) (opinion of Marshall, J.). The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant. It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that "buil[d] discretion, equity and flexibility into a legal system." [citation omitted].

481 U.S. at 311.

In this case, by referring to the Bible, the prosecutor essentially said that the nature of the crime violated the moral principles of the community, so the jury should punish the defendant with death. By referring to the Bible, the prosecutor understood the moral dimension of the decision the jurors had to make and was appealing to a moral standard that he felt Chambers had violated by robbing and murdering the woman, that very aggravating standard permitted by Pennsylvania law. Of course the prosecutor wanted the jury to follow Pennsylvania law and use its legal discretion to impose the death penalty. This is a proper argument that violates no constitutional right of the defendant.

Defense attorneys must inevitably suffer under the cramped rule announced by the Pennsylvania Supreme Court, because defense attorneys must also restrict their pleas for mercy to the jurors only to those factors listed in the statute, or inferences from evidence introduced at trial. Defense attorneys could no longer urge jurors to have mercy and not to impose the death penalty by referring to "the Ten Commandments, Jesus and the Heavenly Father," as the

defense counsel did in *Caldwell v. Mississippi*, 472 U.S. 320, 337 (1985).[16]

This Court should grant cert in this case to clarify once again that challenged prosecutorial comments will be reviewed for prejudice on a case-by-case basis, and that nothing in the Constitution requires a per se reversible error rule for prosecutors who quote the Bible. Also, this Court should grant cert to reaffirm that jurors take into consideration a myriad of moral, theological and ideological principles, including the Bible, when deciding whether to impose the death penalty, in order to reflect the consensus of the community.

This Court should grant the petition in this case and rule that the Pennsylvania Supreme Court erred by imposing a per se rule when the federal Constitution requires no such thing.

II.

THE PER SE RULE AGAINST BIBLICAL REFERENCES VIOLATES THE FREE SPEECH RIGHTS OF PROSECUTORS

Because the United States Constitution does not require the blanket ban on religious references by prosecutors, the Pennsylvania Supreme Court violated the free speech rights of prosecutors by placing an unnecessary restriction on what they may say. This Court should accept this case for review to define the proper limits of protected prosecutorial speech during a trial.

This case is the mirror opposite of *Gentile v. State Bar of Nevada*, 501 U.S. ___, 115 L.Ed.2d 888 (1991). In that case, this Court outlined the constitutional limits of permissible court restrictions on attorneys' speech. This case offers the

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16 In *Caldwell*, this Court also related without comment a reference to a dissenting opinion from the Mississippi Supreme Court in that case, in which it is assumed to be valid for defense attorneys to plead for mercy in capital cases by referring to "Christian, Judean or Buddhist philosophies, quot[ing] Shakespeare or refer[ring] to the heartache suffered by the accused's mother."

issue of impermissible court limits on attorneys' protected speech. The Pennsylvania Supreme Court went beyond what the Constitution mandates to protect fair trial rights of criminal defendants and imposed an unnecessary, absolute restriction on what prosecutors can say in closing arguments of capital cases. Because the per se rule was constitutionally unnecessary, the Pennsylvania Supreme Court infringed on the free speech rights of the prosecutor.

Attorneys have free speech rights in the courtroom, this Court has recognized, but those rights are "extremely circumscribed," *Gentile v. State Bar of Nevada*, 115 L.Ed.2d at 921 (1991). Attorneys participating in a trial obviously have restrictions on their speech, "where necessary to ensure a fair trial for a criminal defendant." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-33 (1984). This standard applies this Court's regular Free Speech Clause test to the courtroom by saying that courts can restrict attorney speech when there is the compelling state interest to ensure that criminal defendants receive a fair trial.

Although attorney speech can be restricted when there is "substantial likelihood of material prejudice," to the fair trial rights of a defendant, *Gentile*, 115 L.Ed.2d at 923, it also means that attorney speech is protected under the First Amendment when the prosecutor's speech does not present a substantial likelihood of material prejudice to the rights of the defendant. This judicial authority to limit attorney speech may be expansive, but it is still finite.

Here, the Pennsylvania Supreme Court went well beyond its constitutional authority. The particular prosecutor's reference to the Bible in this case did not have the substantial likelihood of material prejudice. That court did not stop with the specifics of the particular remark made in this case, but created a comprehensive, content-based restriction on all references to the Bible or other religious works at all times. There is no reason to think that all religious and Biblical

references automatically violate the fair trial rights of defendants in capital murder cases.

Content-based restrictions against religious speech violate the Free Speech Clause unless they are justified by a compelling state interest. See *Widmar v. Vincent*, 454 U.S. 263 (1981). Even if this Court thought that the fair trial interests of the defendant might be violated by the specific remark made in this case, the constitutional rights at stake are better protected by the traditional case-by-case evaluation of the prosecutor's remarks, not the excessive overkill of a flat prohibition.

Also, the Pennsylvania Supreme Court's rule operates as an unconstitutional prior restraint. That court orders all prosecutors in the future not to say certain things during a capital trial. Also, that court threatens prosecutors with disciplinary action if they utter the forbidden speech to jurors. This chills free speech before it is spoken, the classic sign of a prior restraint.

When government suppresses speech of a specific content on the basis of previous publications, the government creates a prior restraint. *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 18-19 (1971). Any prior restraint on expression comes to this Court with the heavy presumption against its constitutional validity. *Keefe*, at 419.

This Court should grant cert in this case, to define the protected limits of prosecutors' free speech rights in the courtroom, and to rule that the fair trial rights of defendants do not justify automatic reversible error, buttressed with the threat of professional discipline to prosecutors.

III.

THE PER SE RULE AGAINST RELIGIOUS REFERENCES VIOLATES THE ESTABLISHMENT CLAUSE

The Pennsylvania Supreme Court's per se rule against religious references violates the federal Constitution's Establishment Clause. That court incorrectly assumes that all

references to the Bible are inherently prejudicial and must be banned. This extreme constitutional theory has no basis in the Constitution or the decisions of this Court. This Court should accept this case for review to declare that the Establishment Clause does not require a flat ban on religious references in the courtroom setting.

In two major cases dealing with classrooms filled with impressionable youth, this Court refused to impose per se prohibitions on all religious literature from public schools.[17] If this Court would not impose a per se ban of religious literature in a public school, certainly there is no precedent or constitutional requirement for such a ban in a courtroom, where prosecutors are speaking to adult jurors, especially if the reference is not asking the jurors to depart from the law of the Commonwealth.

A. Per Se Bans on Religious Speech Violate the Establishment Clause

As this cert petition is being written, the petitioner is aware that this Court has pending before it the case of *Lee v. Weisman*, No. 90-1014 (argued Nov. 6, 1991), in which the

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17. In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), this Court declared classroom Bible reading in public schools to be unconstitutional. But this Court emphasized that it was not creating a per se rule against all religious materials in a public school. This Court said:

> It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. 374 U.S. at 225.

In *Stone v. Graham*, 449 U.S. 39 (1980), this Court ruled that it violated the Establishment Clause to post the Ten Commandments on Kentucky public classroom walls, but also rejected any per se rule banning all religious materials from public schools:

> the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion or the like. 449 U.S. at 42.

petitioners have asked this Court to modify or discard the tripartite Establishment Clause test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). What the Pennsylvania Supreme Court did violates both the *Lemon* test, and also the proposed coercion suggested by the petitioners in *Lee v. Weisman*.

Under the *Lemon* test, the Pennsylvania Supreme Court's order must fall, because it is not neutral toward religion. The second prong of the *Lemon* test states that "the principal or primary effect must be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612-13. This Court has had many cases dealing with challenged governmental action that advances religion, but it has never had a case claiming that the challenged governmental action inhibits religion. This is the unused wing of the "primary effect" prong.

Here, the Pennsylvania Supreme Court is not neutral about religious speech. It has banned it from the courtroom oral arguments in death penalty cases. The Pennsylvania Supreme Court's per se rule against religious speech violates the *Lemon* test, because the per se rule is not neutral towards religion, but inhibits it.

Also, the per se rule is coercive under the proposed *Lee v. Weisman* test, because the Pennsylvania Supreme Court is threatening the prosecutors with disciplinary action if they mention the Bible or other religious writings during their closing arguments. The court is erecting a disciplinary sanction against prosecutors who violate their rule against religious speech.

This Court should accept this case for review and rule that per se rules against religion in the courtroom violate the Establishment Clause.

B. This Court's Decision in *Marsh v. Chambers* Protects The Prosecutor's Argument in This Case.

The Pennsylvania Supreme Court's per se rule against religious references by prosecutors in death penalty cases violates the Establishment Clause, in light of this Court's

pronouncements in *Marsh v. Chambers*, 463 U.S. 783 (1983). In that case, this Court upheld the practice of the Nebraska Legislature to open with prayers said by a government-paid chaplain, due to the extensive historical evidence showing that the First Congress, which passed the First Amendment, engaged in the same practice.

In this case, considerable historic evidence shows that the contemporaries of the Framers of the Constitution routinely referred to the Bible during judicial and jury deliberations.

United States Supreme Court

The first Supreme Court justices, when sitting as circuit justices, frequently invited local clergymen to pray for the grand jurors before they made their deliberations. In early 1790, in anticipation of the new United States Supreme Court justices traveling around the 13 states to sit as circuit justices, federal district court judge Richard Law of Connecticut wrote Chief Justice John Jay (an author of the Federalist Papers) inquiring whether the Chief Justice "would wish to have a Clergyman attend as Chaplain, as has been generally the Custom in the New England States, upon such Occasions.[18]

Chief Justice John Jay responded this way: "The custom in New England of a clergyman's attending, should in my opinion be observed and continued."[19]

Shortly after, on May 3, 1790, Circuit Court opened in Boston, Massachusetts, with Chief Justice John Jay and Associate Justice Cushing in attendance. After the grand jury was sworn in and Chief Justice Jay gave the jurors their

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18 "Letter from Richard Law to John Jay, February 24, 1790, "*The Documentary History of the Supreme Court of the United States, 1790-1794* (Volume 2), (hereinafter, *Documentary History*) at 11.

19 "Letter from John Jay to Richard Law, March 10, 1790, " *Documentary History* at 13.

charge, "the throne of grace[20] was addressed in a well-adapted prayer by the Rev. Dr. Howard" (a minister of the Congregational Church).[21]

Historical records demonstrate that Supreme Court justices had clergymen pray for grand jurors on at least 12 other occasions during the early years of the United States, from 1790 to 1800.[22] In one instance, the Supreme Court justice quoted the Bible to the grand jurors before the pastor prayed for them and before the grand jurors retired for their deliberations.

On May 19, 1800, Circuit Court opened in Portsmouth, New Hampshire, with Associate Justice Patterson in attendance. "After the jury was empaneled, the Judge delivered a most elegant and appropriate Charge ... — Religion & Morality were pleasingly inculcated and enforced, as being necessary to good government, good order and good laws, for 'when the righteous are in authority, the people rejoice.'[23] After the Charge was delivered, the Rev. Mr. Alden addressed the Throne of Grace, in an excellent, well-adapted prayer."[24]

Pennsylvania Supreme Court

Ironically, even the Pennsylvania Supreme Court has relied upon the Bible to make its decisions, which is further evidence demonstrating that what the prosecutor did is protected under *Marsh v. Chambers*. The Pennsylvania

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20 The phrase, "throne of grace" apparently derives from the New Testament—Hebrews 4:16, "Let us therefore draw near with confidence to the throne of grace, that we may receive mercy and may find grace to help in time of need."

21 *Herald of Freedom* (newspaper), May 4, 1790, in *Documentary History* at 60-61.

22 *See Documentary History* at 106, 164-65, 192, 231-32, 276-77, 317, 406, 412, 430, 475, 496, and *Documentary History*, Volume 3, p. 436.

23 The quotation comes from the Old Testament, Proverbs 29:2.

24 *Documentary History, Volume 3*, at 436.

Supreme Court has repeatedly used the Bible as legal authority, including in criminal cases.[25] What the prosecutor did in this case is mild compared to what the Pennsylvania Supreme Court has done. For example, in *Updegraph v. The Commonwealth*, 11 Serg. & R. 393, 406 (Pa. 1824), the Pennsylvania Supreme Court said:

> Christianity is part of the common law of this state ... it is the purest system of morality, the firmest auxiliary, and the only stable support of all human laws. It is impossible to administer the laws without taking the religion, which the defendant in error has scoffed at, that Scripture which he has reviled, as their basis.

In *Mohney v. Cook*, 26 Pa. 342, 343 (2 Casey) (Pa. 1855), the Pennsylvania Supreme Court said:

> The declaration that Christianity is part of the law of the land is a summary description of an existing and very obvious condition of our institutions.

Even after the Civil War, the Pennsylvania Supreme Court was referring to the Bible as a source of law for Pennsylvania in *Zeiweiss v. James*, 13 P.F.Smith 465, 471 (Pa.S.Ct. 1870):

> The laws and institutions of this state are built on the foundation of reverence for Christianity.

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25 Ironically, the Pennsylvania Governor and Legislature repeatedly referred to the Bible when debating whether to enact the death penalty for murder in 1974. The Pennsylvania Legislature passed the current death penalty statute over the veto of Governor Milton Shapp. In his veto message, Governor Shapp said:

> As a child, I was taught reverence for God and reverence for the Commandments of God, and reverence for life which God has bestowed upon us.... The Fifth Commandment of the Lord is concise and all embracing — Thou Shalt Not Kill. The Commandment makes no distinction between a killing by a private citizen or by a public official....1974 Legislative Journal — House, at 4013-4014.

The petitioner cites these cases to demonstrate that historically, courts have tolerated significant references to the Bible in court proceedings that overshadow the one reference to the Bible in this case. In fact, the chambers of the Pennsylvania Supreme Court in Harrisburg are replete with Biblical quotations. Directly behind the justices is a large mural of Moses with the Ten Commandments, with each of the Commandments spelled out in large letters. On the side wall is a large mural depicting Christ saying the Beatitudes to an assembled crowd, with the words of the Beatitudes clearly written out. The side walls also have murals with religious quotes written by William Penn and William Blackstone. The Supreme Court of Pennsylvania, (brochure distributed at the Pennsylvania Supreme Court) at 3, 9-12.

The prosecutor's brief reference to the Bible is far milder than some of the Biblical discourse courts and lawmakers have engaged in. The governor, the legislators and the prosecutor recognized what this Court has said, that the imposition of the death penalty is fundamentally a moral decision. This Court should accept this case for review to rule that the prosecutor's Biblical reference here is protected under the Establishment Clause, as expressed in *Marsh v. Chambers*.

The floor debate includes many members disagreeing with the governor's interpretation of the Bible. Mr. Mullen, a member of the Pennsylvania House of Representatives, quoted Exodus 21:12-14 and said during the debate:

> What this simply means is, if a man willfully commits a murder on another person and kills that other person, the Lord says that he should be required to pay for his own life. The Lord does not say He will not forgive him. He will forgive him all right, but I do not think He is trying to condemn him because He is seeking vengeance. What He is trying to do is point out to our fellowmen that this is not right and it is not justified to kill another man. If you do so, you have to be punished, and this is all we are trying to do in the death penalty. 1974 Legislative Journal — House, at 4019

CONCLUSION

For all of the above-stated reasons, the petitioner urges this Court to grant a writ of certiorari and reverse the decision of the Pennsylvania Supreme Court in this case. This Court's goal of promoting orderly death penalty trials in accord with the Constitution will be served by reversing this extreme and negative ruling against all Biblical references in the courtroom.

Respectfully Submitted,

JORDAN W. LORENCE
JANE E. HADRO
Arlington, Virginia 22206
3479 S. Stafford St.
(703) 882-4799

H. STANLEY REBERT*
District Attorney
Court House
28 E. Market St.
York, Pennsylvania 17401
(717) 771-9600
*Counsel of Record

Attorneys for Petitioner

Date: April 6, 1992

APPENDICES

APPENDIX A

THE SUPREME COURT
OF PENNSYLVANIA

J–103–1990
No. 14 Middle District
Appeal Docket 1989

COMMONWEALTH OF PENNSYLVANIA
Appellee,

v.

KARL S. CHAMBERS
Appellant.

Argued: May 7, 1990.

Decided: Nov. 4, 1991.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and CAPPY, JJ.

Affirmed by published opinion. Justice Papadokos wrote the opinion of the court in which Chief Justice Nix concurred in result. Justice McDermott filed concurring and dissenting opinion.

COUNSEL

ARGUED: Thomas L. Kearney, III, Asst. Defender, for appellant. H. Stanley Rebert, Dist. Atty., for appellee.

OPINION

PAPADAKOS, Justice.

Karl S. Chambers, Appellant, was convicted of murder of the first degree and robbery, and was sentenced to death. Pursuant to 42 Pa.C.S. § 9711(h)(1),[1] this direct appeal

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1 42 Pa.C.S. § 9711(h)(1) provides: **Review of death sentence**. A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

followed. Immediately following the jury's return of its guilty verdicts, the Honorable Joseph E. Erb, of the Court of Common Pleas of York County, commenced a sentencing hearing in which the same jury found one aggravating circumstance to be present, i.e., that the killing occurred during the commission of a robbery (42 Pa.C.S. § 9711(d)(6). The jury also determined that one mitigating circumstance was present, i.e., that the Appellant had no significant history of prior criminal offenses. (42 Pa.C.S. § 9711(d)(6)) (R, pp. 1216-17). The jury found the aggravating circumstance to outweigh the mitigating circumstance and determined that the sentence of death should be imposed. Post-trial motions were considered and denied and the sentences were imposed.[2]

In this direct appeal, Appellant, through his counsel, raises sixteen issues of error allegedly committed by the trial court and, through his pro se supplemental brief, presents issues alleging the ineffective assistance of his counsel at both the trial and in this appeal.[3]

First, the Appellant asserts that insufficient evidence exists to support his conviction of murder of the first degree.[4] The Appellant argues that the evidence, as presented by the Commonwealth, was not based on eyewitness testimony, and that, therefore, the circumstantial evidence does not support a guilty verdict.

[1] Our test for determining the sufficiency of the evidence is, by viewing the evidence in the light most

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2 Along with the death sentence, the court imposed a sentence of not less than ten years nor more than twenty years on the robbery conviction.

3 Appellant presents this supplemental brief pursuant to Pa.Rule of Appellate Procedure 3309(a), 42 Pa.C.S.

4 The Crimes Code defines murder of the first degree as: A criminal homicide ... committed by an intentional killing. 18 Pa.C.S. § 2502 (c) (d).

favorable to the verdict winner, to determine whether the jury reasonably could have concluded that all elements of the crime were established beyond a reasonable doubt. *Commonwealth v. Syre*, 507 Pa. 299, 489 A.2d 1340 (1985), *cert. denied*, 480 U.S. 935,107 S.Ct. 1577, 94 L.Ed.2d 768 (1987).

[2] Our review of the record reveals that the Commonwealth established the following facts. On Saturday, February 1, 1986, at or near 3:30 p.m., the victim, Anna Mae Morris, entered the C & M Variety store (hereinafter the "Fish Store") to purchase groceries with proceeds from her Social Security check which she had cashed the preceding day. The clerk filled her order and tallied her purchases. The victim then reached under her shirt for her wallet, tendered the amount due, put the change in her wallet, replaced her wallet under her shirt and left the store. At the same time, Appellant and a group of his friends were playing pinball and eating fish sandwiches in plain view of the victim. They had recently come from the home of Adam McKinney, a member of this group, where they had smoked some marijuana and drank some alcoholic beverages. These friends testified that Appellant neglected to place money into the common fund they collected for food purchases that day at the fish store and that moments after the victim departed, Appellant told his friends that he had something to do, adding he would meet them later in the evening at Adam McKinney's house. Appellant quickly left the fish store.

No one saw the Appellant, or the victim, until approximately 4:15 p.m. or 4:30 p.m. when Edgar Coder and Travis Wolfe stated that they saw the Appellant and the victim on the Silver Bridge (so named because of its color). They were the last people to see the victim alive.

These witnesses testified that, although they could not hear what the Appellant and the victim were saying to each other, they appeared to be arguing. In addition, Edgar Coder

testified that the Appellant had what appeared to be a large stick in one of his hands. Sometime between 4:45 p.m. and 5:00 p.m., another witness, Kevin Hartmen, while walking his dog there, noticed a body under the Maryland-Pennsylvania Railroad Bridge (hereinafter the "Black Bridge" so named because of its painted color). (The Black Bridge is in close proximity to the Silver Bridge and both of these structures span the Codorus Creek.) Kevin Hartmen immediately contacted his friend, Donald Snell, who also saw the body. Mr. Snell approached his father about what he had seen. His father then told a retired policeman. In turn, the retired policeman contacted the York Police Department and reported the body beneath the Black Bridge.

The police arrived at the scene at 8:35 p.m. and began their investigation. The police found the victim's numerous articles of clothing, her torn open, empty wallet, along with her upper and lower dentures strewn around her lifeless, nude body. The autopsy revealed the victim was beaten to death by a blunt instrument and the cause of death was later determined to be a subdural hemorrhage or brain hemorrhage (R., p. 590).

While the police were investigating the murder scene, Appellant, armed with an axe handle, went to a local bar called the Shady Dell. Before he was permitted to enter the bar, the manager, John Ettline, ordered Appellant to leave this club outside because Mr. Ettline did not want patrons carrying weapons into his establishment. Appellant complied and meandered through the Shady Dell for a time and left without re-claiming his stick. From there he proceeded to Adam McKinney's home. When he arrived at Adam's home, Appellant now possessed alcohol, marijuana, and money. Appellant did not tell his friends where he had been, what he had done, or where he obtained the money to make his purchases, whereas a few hours before he did not have funds to contribute to their kitty.

Over the next few months the police engaged in an exhaustive investigation. The questioning of witnesses revealed that the Appellant often carried an axe handle, that he told his friends the police considered him a prime suspect, and that the police stopped Appellant as he was attempting to leave town. Debra Phillips, a woman who knew the Appellant, told the police she gave the axe handle to him because of a foot injury he received in an altercation with Debra's nephew some time before the murder. At that time, she suspected he could use the handle as a cane. Intense questioning of the Appellant's acquaintances confirmed that on the day of the murder the Appellant was seen carrying this axe handle. Their testimony also revealed that when he entered the fish store on the day of the murder, he had the axe handle with him but the owners requested he leave it outside. When Appellant's friends left the fish store after the Appellant had departed, they noticed that the stick was gone. And finally, they noted that the Appellant did not have "his stick" when he rejoined them later in the evening at Adam's house.

On December 9, 1986, while Appellant was in the York County Prison on charges unrelated to this incident, he confided in two fellow prisoners, Jeffrey Hutchenson and Richard Taylor, and told them that he had killed the victim. Appellant said, "that when he asked the victim for her money and she refused, he hit her and took the money." The next day Jeffrey Hutchenson contacted his attorney, who notified the police. An arrest warrant was then issued on December 12, 1986, for the Appellant.

[3] Although there were no eyewitnesses to the robbery or the murder, we believe the Commonwealth produced sufficient evidence to establish that Appellant robbed and murdered Anna Morris. True, all of the evidence was circumstantial; however, circumstantial evidence is sufficient to sustain a conviction "so long as the combination of the evidence links the accused to the crime beyond a reasonable

doubt." *Commonwealth v. Steele*, 522 Pa. 61, 559 A.2d 904, 909 (1989); *Commonwealth v. Hardcastle*, 519 Pa. 236, 246, 546 A.2d 1101, 1105 (1988). These witnesses were able not only to place the Appellant at or near the scene of the crime, they were also able to provide proof of a motive. Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt. *Commonwealth v. Tedford*, 523 Pa. 305, 567 A.2d 610, 618 (1989). Therefore, we conclude that sufficient evidence exists in the record to support the conviction of murder of the first degree and robbery and we dismiss the Appellant's contrary contention. *Commonwealth v. Marshall*, 523 Pa. 556, 568 A.2d 590, 593 (1989).

PRETRIAL ERRORS

Next, Appellant contends that the trial court committed an abuse of discretion when it granted the Commonwealth's motion to challenge for cause Juror # 41, Kathy Buckington. The Appellant claims the court improperly dismissed this venire person after she advised the court that she could follow instructions regarding the imposition of the death penalty.

[4] The determination to disqualify a prospective juror is made by the trial judge based on both the juror's answers as well as his or her demeanor, and this ruling will not be reversed absent palpable abuse of discretion *Commonwealth v. Blystone*, 519 Pa. 450, 549 A.2d 81(1988). Our reading of the record reveals that the following occurred during the voir dire proceedings.

[5] The court released Mrs. Buckington because she would not follow the law in Pennsylvania regarding the standard of proof in a criminal prosecution. During her voir dire examination, Mrs. Buckington testified that she would hold the Commonwealth to a standard other than "beyond a reasonable doubt." In response to a question from the judge

regarding her willingness to vote for a conviction, Mrs. Buckington responded, "I'd have to be definitely, absolutely satisfied. If I'd have a doubt then someone would have to prove to me to the nth degree." It was apparent to the trial court, as it is to us, that this venire person had her own standard of proof which is different from the one we announced in *Commonwealth v. Webb*, 449 Pa. 490, 296 A.2d 734, 737 (1972), and which merely reaffirmed the well established rule of law that one may not be convicted of murder unless the Commonwealth establishes every essential element of the crime beyond a reasonable doubt. *Id.* We conclude that the trial court acted properly when it sustained the prosecutor's challenge for cause in regards to Mrs. Buckington.

Appellant's second allegation of pre-trial error concerns the trial judge's refusal to grant his motion to continue the trial when he notified the court that the local press disseminated prejudicial pre-trial publicity. Appellant directed the court's attention to an article which appeared on the first morning of the trial in *The Daily Record*, a publication of wide circulation in York County. Immediately thereafter, he objected to the start of the trial because of this prejudicial publicity.

[6,7] When an accused claims to have been prejudiced by an inordinate dissemination of pre-trial publicity pertaining to the crime charged, the accepted procedure is to request a change of venue or, in the alternative, a continuance. *Commonwealth v. Douglas*, 461 Pa. 749, 337 A.2d 860 (1975). Normally, one who claims he has been denied a fair trial because of prejudicial pretrial publicity must show actual prejudice in the impaneling of the jury. *Commonwealth v. Romeri*, 504 Pa. 124.131-32, 470 A.2d 498, 501-02 (1983), *cert denied*, 466 U.S. 942, 104 S.Ct. 1922, 80 L.Ed.2d 469 (1984).

[8,9] Pre-trial prejudice is assumed if: 1) the publicity is sensational, inflammatory, and slanted towards conviction

rather than factual and objective; 2) the publicity reveals the accused's prior criminal record, any, or if it refers to confessions, admissions, or reenactments of the crime by the accused; and 3) the publicity is derived from police and prosecuting officer report. *Commonwealth v. Pursell*, 508 Pa. 212, 221, 495 A.2d 183, 187 (1985). If prejudicial publicity occurs, the trial court may exercise its discretion and may continue the case, change the venue, resort to extensive voir dire to assure the attitudes of jurors have not been influenced by disclosure, or use the costly and inconvenient device of jury sequestration. *Philadelphia Newspaper, Inc. v. Jerome*, 478 Pa. 484, 498, 387 A.2d 425, 432 (1978.)

[10] Here, the trial court diligently that [sic] noted this publication listed information pertaining to this case and other cases slated for trial during the court's term. Specifically, the article detailed the following information about the Appellant: his name, his age, the nature of his case, and the dates of the alleged occurrence. Also, the article made a reference to the victim's "nude and battered body," a statement the court felt could heighten the interest of the individuals reading it. Nevertheless, the court noted that it felt the journalistic report did not go beyond anything which would be introduced at trial, and the Appellant had not suffered any prejudice due to the publication of this pre-trial article (R., p. 4).

Since the voir dire examination is the proper place to determine whether a defendant's public notoriety has resulted in a prospective juror's prejudice, an extensive voir dire was conducted. The trial court permitted Appellant's counsel to ask any prospective juror, "whether they read the paper, and if they had, whether they would be influenced by what the paper said. The judge assured counsel that "[i]f they could not set aside information given in the paper, we will consider whether they should be excused as jurors." (R., p. 4). Thereafter, the jurors were advised not to read any newspaper articles regarding the case or to watch television

coverage of the event. Moreover, the Appellant neither moved for a change of venue, nor did he request a sequestration of the jurors. Based on our review of the record, we can perceive no abuse of discretion or error of law in denying the Appellant's motion for continuance where no actual prejudice was demonstrated and dismiss the Appellant's contrary allegation.

GUILT PHASE ALLEGATIONS OF ERROR

[11] Appellant alleges that the trial court committed an abuse of discretion when it refused to grant his motion for a mistrial after the Commonwealth produced a statement taken from the Appellant which was not supplied to his defense counsel during pre-trial discovery. This statement is best described as handwritten notes inscribed by Detective Smith, a York police officer, of statements made by the Appellant in an interview which occurred two days after the homicide. Detective Smith did not incorporate the notes into his police report because he thought he had lost the notes through his own inadvertence. After the trial commenced, however, Detective Smith re-discovered the notes and promptly presented them to the prosecutor who delivered a copy to the Appellant's counsel. The Appellant asserts, in his brief, that the Commonwealth's failure to provide this statement until after the trial began is a denial of his right to due process as announced in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194,10 LEd.2d 215 (1963). Appellant claims that the Commonwealth's failure to produce this note upon demand pursuant to Pennsylvania Rule of Criminal Procedure 305 also constitutes a violation of Rule 305(B), thereby "thwarting defense counsel's pre-trial discovery." Technically, Appellant believes he should have been "granted a continuance to thoroughly investigate the newly discovered evidence and was unduly disadvantaged by this 'surprise.' "

The trial judge conducted an *in-camera* examination of the note which revealed that it was neither an incriminating

statement nor an admission against Appellant's interest. The content of the note revealed that the Appellant may have engaged in illicit conduct with a person by the name of "Smitty" at some point in the evening following the murder. A thorough investigation conducted by the detective produced neither an individual by the name of Smitty, nor information as to the whereabouts of a person by the name of Smitty.

[12] Where the evidence is material either as to guilt or as to punishment, irrespective of the good or bad faith of the prosecution, suppression of evidence favorable to the accused violates due process. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97. Mr. Justice Nix, (now Chief Justice Nix) speaking for the court in *Commonwealth v. Murphy*, 493 Pa. 35, 425 A.2d 352 (1981), explained:

It is to be noted that the Brady rule was not intended as a rule of discovery in criminal cases. There is no general constitutional right to discovery in a criminal case, and Brady did not create one; ... "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded...." *Wardius v. Oregon*, 412 U.S. 470, 474, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82 (1973); *Weatherford v. Bursey*, 429 U.S. 545, 549, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977).

Murphy, 493 Pa. at 45, 425 A.2d at 357. In *Brady*, the defendant did not discover the non-disclosed evidence until after his trial, conviction, and sentencing. Thus, Brady complained he was denied his rights under due process of law because the jury did not have the benefit of the evidence when they assessed his guilt and determined his penalty. This is not the situation here, where the infirmity alleged is that the prosecutor failed to disclose the evidence prior to the trial. Therefore, *Brady* is inapplicable.

[13] Also, a request for a mistrial is out of proportion to the discovery violation alleged. A mistrial is required only

when an incident is of such a nature that its unavoidable effect is to deprive appellant of a fair trial. *Commonwealth v. Crawley*, 514 Pa. 539, 554, 526 A.2d 334, 342 (1987), citing *Commonwealth v. Hernandez*, 498 Pa. 405, 415, 446 A.2d 1268, 1273 (1982). Our Pennsylvania Rule of Criminal Procedure 305(E),[5] provides:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, other than testimony of the defendant, or it may enter such order as it deems just under the circumstances.

It is important to note that the district attorney did not cause the Appellant to be denied this information; rather, it was through the inadvertence of the investigating officer, Detective Smith, who misplaced his notes. Second, the district attorney immediately gave the notes to Appellant's counsel as soon as he came into possession of them on the first day of the trial. Defense counsel was given the opportunity to view the evidence and to discuss the notes with the Appellant, who informed his counsel that it would be impossible to locate the

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5 Rule 305(B)(1)(b) states:

(1) Mandatory: In all court cases, on request by the defendant, and subject to any protective order which the Commonwealth might obtain under this rule, the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case. The Commonwealth shall, when applicable, permit the defendant's attorney to inspect and copy or photograph such items.

(b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made, which is in the possession or control of the attorney for the Commonwealth: . . . Pa. Crim. P., Rule 305, 42 Pa. C.S.

person referred to as "Smitty." (R., p. 561). Defense counsel relayed this information to the court and further stated that he would not be able to locate "Smitty" should the court grant him a continuance. (R., p.562). And third, Appellant's counsel did not ask for a continuance after trial judge held an *in camera* view of the testimony of Detective Smith regarding his investigation of this matter. In disposing of Appellant's motion, the court noted on the record:

We recognize that this statement through inadvertence was not given to counsel for the Defendant. But there appears to be only one factor in the statement that cannot be verified at this time; and that deals with a person by the name of Smith who according to the statement would have seen the Defendant some substantial period after the event occurred. ... the individual ... is not an alibi witness, and in any event could be used perhaps to some limited extent to contest testimony of other witnesses.

... the only problem with this statement is giving the defense sufficient time to discuss it with his client, which we will do if he wishes. But we will not declare a mistrial, nor will we grant a mistrial, nor will we grant the motion to allow the Commonwealth to use the statement if there are conflicting—if there is conflictive [sic] testimony by the defendant from the stand as indicated.

We will give the defense counsel sufficient opportunity to go over the statement with his client so that his client is familiar with it and counsel is familiar with it before calling the client to stand. . . .

(R., pp. 572-73). Since Appellant has not demonstrated how he was prejudiced by the failure to review these notes prior to trial, we find no abuse of discretion or error of law in the trial judge's refusal to grant a mistrial.

[14] Appellant next argues that the trial court committed an abuse of discretion when it allowed the

prosecutor to use the Appellant's statement, objected to in the argument above, in its case in chief. Specifically, Appellant argues that the nondisclosure of the police officer's report was deliberate on the part of the prosecution and amounts to 'gross negligence," and in support of this argument, the Appellant cites the case of *Commonwealth v. Jenkins*, 476 Pa. 467, 383 A.2d 195 (1978).

Jenkins provided an oral statement to an investigating officer, who transcribed Jenkins' statement into his own notes, which he included with a written report. The trial judge ordered all such reports be made available to the defendant pursuant to the rules of criminal procedure then in effect. The assistant district attorney consistently denied their existence, and repeatedly assured the court, and the defense counsel, that no such statements existed despite their presence in the prosecutor's files. After the defendant placed his credibility at issue by taking the stand in his own behalf, the report was produced. The court permitted the prosecutor, over the objection of defense counsel, to use this report of Jenkins' oral statement. Afterward, it was determined that the report had been part of the Commonwealth's files from the outset of the investigation and had, at one point, been read by the assistant district attorney. Consequently, the trial court held, "since the misconduct went solely to the issue of defendant's credibility," the prejudicial impact of the prosecution's "deliberate or grossly negligent failure . . . to produce the report" was minimal and did not require a new trial. *Supra*, 476 Pa. at 470, 383 A.2d at 196. We did not agree. On review, we held that Jenkins was entitled to a new trial because the non-disclosure affected the fairness of his trial.

Appellant's reliance on *Jenkins* is misplaced. The mere allegation of "gross negligence" on the part of the prosecutor is not enough to come within the ambit of *Jenkins*. Appellant

has not established that the prosecution committed any misdeeds or that its actions resulted in giving him an unfair trial. Upon review we fail to discern any similarities between the fact patterns occurring in this case and those which occurred in *Jenkins*.

As already noted, the trial court recognized that this statement, through inadvertence, was not given to counsel for the Appellant. By contrast, the prosecutor in *Jenkins* not only withheld the statement from the defense, he denied he had it in his possession. Here, the trial judge permitted defense counsel to view the statement, discuss its contents with Appellant, and to question the detective at length, *in camera*, regarding his subsequent investigations and findings. Additionally, the trial judge ruled that he would not allow the Commonwealth to use the statement if "there is conflict[ing] testimony by the defendant from the stand." Under these circumstances, we affirm the trial court's action in permitting the prosecution to refer to the officer's notes.

[15] Appellant's next contention is another allegation accusing the prosecutor of withholding evidence. Appellant postulates that the trial court erred because it would not grant a mistrial when the prosecutor used a prior inconsistent statement which was not supplied to the Appellant pursuant to his discovery request, to impeach defense witness Howard Chapmen. Appellant argues that this conduct was also violative of Pa.R.Crim.P. 305.

The notes in question were transcribed by Detective Provenza of the York police department, during an interview with Mr. Chapman, and were not included in his investigation notes with the police report. Detective Provenza withheld his notes from the assistant district attorney until after defense counsel concluded his direct examination. The prosecutor then attempted to cross examine the witness concerning statements he testified to during the trial and those he gave previously to the detective.

Appellant's claim fails because the testimony of this defense witness is not subject to pre-trial discovery under Rule 305.[6] Howard Chapman is neither a prosecution witness, a co-defendant, a co-conspirator nor an accomplice. He is a defense witness whose testimony did not affect the guilt or innocence of Appellant and, therefore, could not be prejudicial to him.

Appellant next claims that the trial court committed an abuse of discretion when it permitted the pathologist, Doctor Silverman, to testify regarding the victim's blood type. Appellant contends that the pathologist did not authenticate the blood sample nor did the Commonwealth properly establish the custodial chain from the doctor's withdrawal of the blood sample to the laboratory's testing of the evidence in question.

[16] Generally, an expert may not state a conclusion which is based on evidence not in the record. *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 693 (1971). Nonetheless, this Court has determined that a medical expert is permitted to express opinion testimony on medical matters based, in part, on reports of others which are not in evidence, but which the medical expert customarily relies upon in the practice of his profession. *Commonwealth v. Smith*, 480 Pa. 524, 532, 391 A.2d 1009, 1013 (1978); *Thomas*, 444 Pa. at 445, 282 A.2d at 698.

[17] A review of this record reveals that the Appellant stipulated to Doctor Silverman's qualifications as a pathologist and to the nature of a pathologist's expertise, i.e., that a pathologist examines laboratory specimens, tissues,

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6 Rule 305(B)(2)(b) states:

(2) Discretionary with the Court: In all court cases ... if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing they are material to the preparation of the defense, and that the request is reasonable; and those he gave previously to the detective.

fluids, and upon occasions performs autopsies (R., p. 584). Doctor Silverman performed the autopsy on this victim at the York Hospital on February 2, 1986 and prepared his report on February 3, 1986. Pursuant to his normal autopsy examination procedure, the doctor withdrew blood from the cadaver and transported it to the blood bank for analysis (R., p. 614). Although this blood analysis report was not introduced into evidence, the doctor used the information in his own report to surmise the blood type of the victim. When queried as to victim's blood type, Doctor Silverman testified that it was O positive.

Since the witness normally relied upon reports such as these, the trial court did not abuse its discretion when it ruled that the witness could testify as to the findings in the lab report concerning the victim's blood type, which in any event, did not link Appellant to the crime.

[18] Appellant next argues that the trial court should have granted a mistrial because the medical testimony did not establish that the victim received "tens of blows" as the prosecutor described in his opening statement to the jury. Appellant maintains that the district attorney intentionally misstated the evidence to mislead and to inflame the jury so that they would return with a finding of guilt.

Our examination of the record discloses that the district attorney did not make this comment during his opening statement; instead, he made it during the individual voir dire of a prospective juror, Josephine J. Huber, who was not selected as a juror or as an alternate on Appellant's panel. (R., p. 168). Any prejudice, therefore, was cured when the venire person was not seated on the jury and Appellant's contrary contentions are rejected.

(b) all written or recorded statements, and substantially verbatim oral statements, of eye-witnesses the Commonwealth intends to call at trial;

(c) all written or recorded statements, . . . verbatim oral statements, made by co-defendants, . . . co-conspirators or accomplices . . .

Appellant also claims that the trial court committed an abuse of discretion because it refused to grant his motion for a mistrial when he objected to both the leading questions that the prosecutor asked Edgar Coder during his direct examination and to the district attorney's explanation "that he was leading the witness so that no prejudicial testimony would come out before the jury."

[19] The record reveals that the court permitted the prosecutor to ask leading questions on direct-examination because the witness was fourteen years of age. A discussion, held at sidebar, revealed that this witness alleged that the Appellant and another person not involved with the present incident, had robbed him. The district attorney was attempting to exercise caution so that this witness would not make a reference to the Appellant's involvement in another robbery. On the other hand, defense counsel requested the court to compel the district attorney to give cautionary instructions to the witness (R.p. 729). The trial judge took these requests into consideration and determined that he would allow the district attorney to lead the witness because of his age because he felt this course of action would not harm the Appellant and would prevent any future problems the court could encounter if the witness unintentionally made a statement regarding the Appellant and his alleged robbery of this witness (R.p.729).

[20] A leading question is one which puts the desired answer in the mouth of the witness. *Commonwealth v. Dreibelbis*, 493 Pa. 466, 476, 426 A.2d 1111, 1116 (1981); *Kelly's Estate*, 399 Pa. 153, 159 A.2d 739 (1960). In *Commonwealth v. Deitrick*, 221 Pa. 7, 70 A. 275 (1908) we held:

The rule that a party calling a witness as not permitted to ask leading questions ... is [to be] liberally construed in modern practice, with a large measure of discretion in the court to permit parties to elicit any material truth without

regard to the technical considerations of who called the witness. It is a discretion not susceptible of exactly defined limits before hand, but to be exercised in the interests of justice and a fair trial under the circumstances as they arise.

Deitrick; *Commonwealth v. Reeves*, 267 Pa. 361,110 A. 158 (1920). Considering the age of the witness and the Appellant's alleged involvement in another robbery, we see no abuse of discretion in allowing the district attorney to lead this witness through direct examination.

[21] In regards to the district attorney's remark, "Well, I don't want to get any prejudicial information into the record, Your Honor ...," defense counsel argued this statement implied there was prejudicial information, and the court should have granted his motion for a mistrial (R., p. 727). The trial judge discussed this matter with the attorneys at side bar, and he denied the motion for a mistrial because he believed the jury had no idea as to what "prejudice" the district attorney was referring (R., p. 729). When defense counsel made this motion, the prosecutor was eliciting information from the witness regarding a run-in he had with Vince Raineri (R., p. 726). The court argued that if it were to poll the jury as to what they thought the prosecutor had meant by "prejudicial" the jury would not know. The parties were instructed to proceed. We find no error with the trial court action.

[22] Appellant next claims that the trial judge erred when he permitted the district attorney to call additional witnesses not contained in the Bill of Particulars. Appellant claims that the Commonwealth's "failure" deprived him of the opportunity to conduct a thorough investigation of those witnesses, to explore any weaknesses in their testimony, and to counteract any unfair surprise.

[23] A bill of particulars is intended to give notice to the accused of the offenses charged in the indictment so that he may prepare a defense, avoid a surprise, or intelligently raise

pleas of double jeopardy and the statute of limitations. *Commonwealth v. Simione*, 447 Pa. 473, 291 A.2d 764 (1972); *Dreibelbis*, 493 Pa. at 472-73, 426 A.2d at 1114. It is not a substitute for discovery and the Commonwealth's evidence is not a proper subject to which a bill of particulars may be directed. *Commonwealth v. Davis*, 470 Pa. 193, 368 A.2d 260 (1977); *Dreibelbis*, 493 Pa. at 472-73, 426 A.2d at 1114. We agree with the trial Court that Appellant attempted to disguise his discovery requests as a bill of particulars, and, conclude that the trial court properly rejected Appellant's attempt to stop these witnesses from offering their corroborative testimony.

PENALTY PHASE

[24] Appellant next claims that the court abused its discretion when it permitted the jury to consider the death sentence after the prosecutor conveyed his personal opinions concerning the death penalty. Second, the Appellant claims that the court erred when it permitted the jury to consider the death penalty after the prosecutor concluded his argument by quoting a passage contained in the Bible.

The first instance of alleged error occurred when the prosecutor argued to the jury:

I submit, ladies and gentlemen .. . If the death penalty is a deterrent, *and I believe it is*; and if the death penalty serves the societal needs for retribution, *and I believe that it does*; and if the death penalty serves the cathartic needs of the survivors of the victim, *and I believe it does* (Emphasis added).

(R., p. 1198-99).

[25] The terms of our death penalty statute permit a prosecutor to argue in favor of the death penalty. 42 Pa.C.S. § 9711(a)(3); *Commonwealth v. Travaglia*, 502 Pa. 474, 503, 467 A.2d 288, 302 (1983), *cert denied*, 467 U.S. 1256, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984); *Commonwealth v. Sneed*, 514 Pa. 597, 613, 526 A.2d 749, 757 (1987). Therefore, we

have concluded that the prosecutor must have reasonable latitude in arguing his position to the jury during the penalty phase of the trial. *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 55, 454 A.2d 937, 958 (1983), *cert. denied*, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). There is nothing improper in the prosecutor arguing the appropriateness of the death penalty because that is the only issue before the jury at the penalty phase of the trial. *Sneed, supra*. In the case at bar, the trial judge determined that the prosecutor's remarks were not prejudicial. He instructed the jury to disregard these statements and to consider them only as argument presented by counsel (R.p. 1201) Further the judge reminded the jury of their duty under the law and that their determination of the facts, not the beliefs of counsel, governed the outcome of the case (R., p. 1201). These instructions put the prosecutor's comments into their proper context and dispel any argument of prosecutorial misconduct.

Appellant's next contention is that the trial judge erred when he permitted the jury to deliberate after specifically instructing the district attorney that he was not to argue the brutality of the beating as an aggravating factor, but the district attorney argued this fact anyway. Our review of the record reveals this argument is factually incorrect. The district attorney argued a sole aggravating factor. "Killing committed in the perpetration of a felony." (R., p. 1197).

[26] Appellant also contends that the trial court erred when it allowed the jury to consider the death penalty using the commission of a felony as the sole aggravating factor. Defense counsel argues this charge forms the basis of a second degree murder charge and cannot support the aggravating circumstance.

This argument is similar to the argument raised in *Commonwealth v. DeHart*, 512 Pa. 235, 516 A.2d 656 (1986), *cert denied*, 483 U.S. 1010, 107 S.Ct. 3241, 97 L.Ed.2d 746 (1987), which concerned the similarity between

an aggravating circumstance and the definition of second degree murder. 18 Pa.C.S. § 2502(b) and (d). We held in *DeHart*:

> This argument ignores the qualitative distinction between first and second degree murder. The essential element which distinguishes first degree from the lesser grades of murder is specific intent to kill. *Commonwealth v. Moore*, 473 Pa. 169, 373 A.2d 1101 (1977) (citing cases). In contrast, the intent necessary to establish second degree murder is constructively inferred from the malice incident to the perpetration of an underlying felony. *Commonwealth v. Tarver*, 493 Pa. 320, 426 A.2d 569 (1981). Moreover, the fact that a first degree murder was committed in perpetration of a felony has been determined by the legislature to be an aggravating factor to be considered in the sentencing process. Thus a first degree murder committed in perpetration of a felony is not only a murder of a higher degree, it is made further culpable by the commission of the accompanying felony.

DeHart, 512 Pa. at 261, 516 A.2d at 669, 70. Therefore, Appellant's motion was properly denied.

[27] Appellant also alleges that the trial court committed an error of law when it refused to grant the Appellant a new trial based on alleged after-discovered evidence. A new trial is not warranted on the basis of after discovered evidence, unless: 1) it could not have been discovered until after the trial despite reasonable diligence; 2) it is not used for merely cumulative or impeachment purposes; and 3) it is of such a nature that it would compel a different outcome. *Commonwealth v. Hugney*, 491 Pa. 222, 420 A.2d 422 (1980); *Commonwealth v. Scott*, 503 Pa. 624, 628, 470 A.2d 91, 93 (1983).

[28-31] After trial, one of the witnesses at the trial for the Appellant, one Aaron Heiner, stated that a Michael Boyard had told him that he, Michael Boyard, had killed the

old lady. He forgot to mention it during the trial and while he was testifying on behalf of the Appellant. This information was discoverable prior to, or during the trial. Therefore, the testimony of this witness would fail under *Scott*. In regard to a post-trial statement of Robin Wright, this affidavit merely reveals that the same Michael Boyard asked the affidavit where he could hide a stick he used to "beat somebody up with." The affiant does not identify the alleged victim, therefore, it is doubtful that this evidence would compel a different outcome. *Scott, id.* Accordingly, the trial court correctly denied Appellant's motion for a new trial.[7]

[32] Finally, Appellant argues that the prosecutor overstepped the permissible bounds of oratorical flair in his closing argument referring to the Bible. The record shows that the prosecutor stated, "Karl Chambers has taken a life." (R., p. 1201). "As the Bible says, 'and the murderer shall be put to death.' " (R., p. 1201). Defense counsel objected. The trial court immediately noted this objection and gave a curative instruction to the jury.

The guidelines governing a review of a claim of allegedly improper and prejudicial remarks made by a

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7 Appellant raises five issues in his *pro se* petition alleging ineffective assistance of his trial counsel and one issue of court error. In his allegation of court error, the Appellant claims the Commonwealth's witnesses, especially Jeffrey Hutcheson and Richard Taylor, who were career criminals, lacked credibility. Issues of credibility are properly left to the trier of fact for resolution, and the finder of fact for resolution, and the finder of fact is free to believe all, part, or none of the evidence. Fahy, 512 Pa. 298, 516 A.2d. 689 (1986). Since we have concluded that the evidence is sufficient to support the verdicts, Appellant's credibility arguments have no merit.

Next, Appellant claims that his defense counsel was ineffective. Ineffectiveness claims are measured by two components: 1) counsel's performance is evaluated in light of its reasonableness if it is determined that the underlying claim is of arguable merit; and, 2) the defendant is required to show how the ineffectiveness prejudiced him. *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987).

prosecutor during a sentencing hearing are set forth in *Commonwealth v. Zettlemoyer*, 500 Pa. 16 at 53-54, 454 A.2d 937 at 956-57, wherein we explained:

The primary guideline in assessing a claim of error of this nature is to determine whether the unavoidable effect of the contested comments was to prejudice the jury, forming in their minds fixed bias and hostility towards the accused so as to hinder an objective weighing of the evidence and impede the rendering of a true verdict. *Commonwealth v. McNeal*, 456 Pa. 394, 319 A.2d 669 (1974); *Commonwealth v. Van Cliff* 483 Pa. 576, 397 A.2d 1173 (1979). In making such a judgment, we must not lose sight of the fact that the trial is an adversary proceeding, Code of Professional Responsibility, Canon 7, E.C. 7-19—7-39, and the prosecution, like the defense, must be accorded reasonable latitude in fairly representing its version of the case to the jury. *Commonwealth v. Cronin*, 446 Pa. 138, 346 A.2d 59 (1975). Nevertheless, we do require that the contentions advance must be confined to the evidence and the legitimate

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First, Appellant claims that his defense counsel was ineffective in not investigating the witnesses, Aaron Heiner and Robin Wright, and their whereabouts, when the trial judge and the district attorney claimed they were missing. We have already addressed this after-discovered evidence claim and rejected it as meritless and must reject any ineffectiveness claim along these lines.

Next, Appellant accuses his defense counsel of not acting as a reasonable advocate on his behalf. He contends that his counsel did not file any constitutional challenges to the death penalty; that he failed to exercise Appellant's right under the *Witherspoon* doctrine (*Witherspoon v. Illinois*, 391 U. S. 510, 88 S. Ct. 1770, 20 L. Ed.2d 776 (1968)); and that counsel failed to establish an evidentiary record which could be used to demonstrate bias against the Appellant. First, in *Zettlemoyer*, this court has rejected claims that the death penalty is unconstitutional under both the state and federal Constitutions. *Zettlemoyer, id.* Second, this Appellant fails to set out with any degree of specificity the underlying facts for his *Witherspoon* violation. And finally, Appellant also fails to state specifically how he was prejudiced by his counsel's alleged failure to "establish and evidentiary record."

inferences to be drawn therefrom. *Commonwealth v. Revty*, 448 Pa. 512, 295 A.2d 300 (1972). Deliberate attempts to destroy the objectivity and impartiality of the finder of fact so as to cause the verdict to be a product of the emotion rather than reflective judgment will not be tolerated. *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978). The verdict must flow from the respective evidence presented and not represent a response to inflammatory pleas for either leniency or vengeance. *Commonwealth v. Starks*, 479 Pa. 51, 387 A.2d 829 (1979).

[33] In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits of "oratorical flair" and have cautioned that such references are a dangerous practice which we strongly discourage. *Commonwealth v. Henry*, 524 Pa. 135, 569 A.2d 929 (1990); *Commonwealth v. Whitney*, 511 Pa. 232, 512 A.2d 1152 (1986). We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

Here, the prosecutor argued, "As the Bible says, 'and the murderer shall be put to death.' " This reference is substantially different than the references tolerated in *Henry* and *Whitney* where the prosecutor allegorically likened the

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Appellant also claims that he was prejudiced when his trial counsel failed to object when the prosecutor introduced evidence of Appellant's prior convictions. There can be no merit to this argument since the prosecutor introduced this evidence only in response to Appellant's decision to testify in the hopes that he could persuade jury that he was not involved in any "significant prior criminal history."

Finally, Appellant claims that his defense counsel was ineffective because he failed to argue that Pennsylvania's death penalty statute creates a presumption favoring death. This argument was rejected in *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986), *cert denied*, 479 U.S. 1070, 107 S.Ct. 962, 93 L.Ed.2d 1010 (1987); *Commonwealth v. DeHart*, 512 Pa. 235, 516 A.2d 656, (1986).

Defendant to the Prince of Darkness mentioned in the Bible to establish that he was an evil person.

More than allegorical reference, this argument by the prosecutor advocates to the jury that an independent source of law exists for the conclusion that the death penalty is the appropriate punishment for Appellant. By arguing that the Bible dogmatically commands that "the murderer shall be put to death," the prosecutor interjected religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom. We believe that such an argument is a deliberate attempt to destroy the objectivity and impartiality of the jury which cannot be cured and which we will not countenance. Our courts are not ecclesiastical courts and, therefore, there is no reason to refer to religious rules or commandments to support the imposition of a death penalty.

Our Legislature has enacted a Death Penalty Statute which carefully categorizes all the factors that a jury should consider in determining whether the death penalty is an appropriate punishment and, if a penalty of death is meted out by a jury, it must be because the jury was satisfied that the substantive law of the Commonwealth requires its imposition, not because of some other source of law.

Because the prosecutor's argument in favor of the death penalty reached outside of the evidence of the case and the law of this Commonwealth, we are not convinced that the penalty was not the product of passion, prejudice or an arbitrary factor and therefore, pursuant to our Death Penalty Statute, we must vacate the sentence of death and remand this matter for a new sentencing hearing. 42 Pa.C.S. § 9711(h)(4).

Accordingly, the conviction of murder of the first degree and the conviction and sentence imposed for robbery are affirmed; the sentence of death is vacated and matter is remanded to the Court of Common Pleas of York County for a new sentencing hearing.

NIX, CJ., concurs in the result.

McDERMOTT, J., files a concurring and dissenting opinion.

McDERMOTT, Justice, concurring and dissenting.

I join the majority's affirmance of the conviction, however, I must dissent from the overreaction of the majority to the prosecution's biblical reference. The standard in evaluating whether a prosecutor crossed the line in his closing argument is whether his comments would have "the effect of arousing the jury's emotion to such a degree that it becomes impossible for the jury to impose sentence based on consideration of the relevant evidence according to the standards of the statute." *Commonwealth v. Travaglia*, 502 Pa.474, 502, 467 A.2d 288, 302 (1983). In this case the isolated comment of the prosecutor was the last sentence in a brief closing. This was not emotional oratory calling for divinely motivated retribution; rather it was a reference to one of the texts from which our social system has evolved. The majority opinion is an unmerited censure of citizens called to such vast responsibility. To believe them swayed from their solemn, sworn duty by a single reference to a legal irrelevance is a presciosity that undermines the very essence of trial by jury.

APPENDIX B

J-103-1990
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee

No. 14 Middle
District Appeal
Docket 1989

v.

KARL S. CHAMBERS,
Appellant

ORDER

PER CURIUM

AND NOW, this 7th day of January, 1992, the Application for Reargument is denied.

TRUE AND CORRECT
COPY:
Attest: January 7, 1992

/s/
Mildred E. Williamson,
Deputy Prothonotary

APPENDIX C

Transcript of Proceedings

MR. REBERT: Ladies and gentlemen, as Mr. Kearney said, the Legislature has set forth the standards that we are governed by. They are limited. They are highly limited.

One of the aggravating circumstances the Commonwealth is permitted to argue and prove is the death having occurred in the commission of a felony. That has already been determined by you. I think your verdict indicates you are satisfied that the Defendant committed a robbery while in the course of this killing and that proof of that was made beyond a reasonable doubt as is the Commonwealth's standard.

With respect to that aspect of the trial, the Defendant has a burden for once. His burden is to prove to you by a preponderance of the evidence, a lesser standard than the Commonwealth, any of those things in mitigation that Mr. Kearney has mentioned.

He has mentioned age as a mitigating factor. Twenty-four now, 23 then. A young man. And he explains to you that that is self-explanatory.

The Commonwealth would submit that it is self-explanatory. The Legislature has determined that a boy becomes a man at 18. We are at least five years beyond that. Karl Chambers is responsible for his criminal conduct at 23.

The Defendant has submitted that he was under extreme mental or emotional distress at the time of the killing, and he didn't appreciate the criminality of his act. To a very great degree, you have also made that determination. You have determined that he is guilty of the first-degree murder.

You were instructed by the Court as to your finding if you determined that booze or drugs had an impact on what Karl Chambers was doing. I submit, ladies and gentlemen,

that argument of counsel is exactly that ticket to killing an individual that I pled with you not to give Karl Chambers. If the death penalty is a deterrent, and I believe that it is; and if the death penalty serves the societal needs for retribution, and I believe that it does; and if the death penalty serves the cathartic needs of the survivors of the victim, and I believe that it does --

MR. KEARNEY: May we approach the bench, Your Honor?

(Whereupon, the following discussion occurred at sidebar:)

MR. KEARNEY: Your Honor, counsel has repeatedly stated what he believes. That is not relevant. It is clearly an error. I believe that there have been cases, and I am aware -- mistrials have been declared when that has been done and that's on closing argument. Certainly if there ever was a closing argument to be made, this is one.

I don't know how one can at this juncture -- would ask for a mistrial. I'm asking for one, however, because of what the counsel has just done. If that is denied and if the Court makes a determination that that cannot be done at this case, I quite honestly do not know what other remedy would be available to the Defendant at this case which would cure prejudice.

When a mistrial is granted, it is certainly a less severe capital case. I would, therefore, believe that the Court would have no alternative but to declare a mistrial at this point.

MR. REBERT: Your Honor, the cases dealing with mistrials as far as the Commonwealth stating its belief go to the credibility of witnesses and/or the credibility of the Defendant. Anything further -- I will state that I submit rather than I believe, although I don't feel I have to.

THE COURT: Just so that we are clear, the Court at this juncture feels that it is sufficient that the Court advised

the jury as to their function. It is not the belief of either counsel, they're simply arguing. It is the finding of the jury. And whether or not the laws are right and wrong or indifferent of what people believe about them is not the point of this trial.

It is their determination under the law. We will so instruct the jury, and we will instruct counsel not to refer to his beliefs.

(Whereupon, the discussion at sidebar was concluded.)

THE COURT: We have had a discussion at sidebar, ladies and gentlemen, and I believe you have heard prior to this that it is not the beliefs of counsel that govern the determination of the jury or the belief of the Court. Therefore, counsel in arguing their beliefs should be disregarded by the jury. They may consider counsels' arguments. But what counsel believes is not important or of any significance in the case.

It is the jury's determination under the law and their duty under the law. So you will disregard the statements made by counsel concerning beliefs as to what occurs or what should be done. That is for the jury.

MR. REBERT: Since the death penalty prevents the murderer from murdering again, that is the appropriate sentence in this case.

Karl Chambers has taken a life. As the Bible says, And the murderer shall be put to death. Thank you.

MR. KEARNEY: I object to that, Your Honor. It is clearly not relevant to quote the Bible or what any other documents says.

THE COURT: The Court will charge the jury and will note your objection.

JURY CHARGE

You now heard, ladies and gentlemen, some testimony presented. You have heard the arguments of counsel. Now as I indicated to you, you are in the second phase of this trial. It is for you to make additional determinations.

You as members of the jury must now decide whether the Defendant will be sentenced to death or life imprisonment. This sentence depends entirely upon your findings concerning aggravating and mitigating circumstances.

The Crimes Code in Pennsylvania, which is the governing law, provides that a verdict must be a sentence of death if the jury unanimously finds that there is at least one aggravating circumstance and either no mitigating circumstances or the jury unanimously finds that one or more aggravating circumstance outweigh any mitigating circumstances. Then in all other instances, the verdict must be life imprisonment.

(The remainder of the jury charge is not included here.)